Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 87-389

In The Supreme Court of the United States

October Term, 1987

SUSAN MARY NORRIS,

Petitioner,

v.

WILLIAM W. WIRTZ, Individually, as Trustee, and as Executor of the Estate of ARTHUR M. WIRTZ, ST. LOUIS ARENA CORPORATION, ARENA BOWL, INC., and WIRTZ CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. THE LOWER COURTS DID NOT APPLY STATE TOLLING PRINCIPLES, AND PETITIONER DID NOT WAIVE HER OBJECTION TO THE DISTRICT COURT'S REFUSAL TO DO SO.

Although the respondents characterize the rulings below rejecting the use of state tolling principles in Rule 10b-5 litigation as involving merely a "local issue" (Br. in Opp. 13), the Court of Appeals endorsed the critical importance of the issue in its "plea for help" to this Court in this "vexing" area. (App. A-5) Respondents do not deny the existence of the confusion and conflicts. According to respondents, however, the Court of Appeals simply applied *Illinois* tolling principles, *sub silentio*, by approving the district court's jury instruction. Respondents also suggest that petitioner waived her contention that Illinois tolling principles should be applied. Both of these contentions are without merit.

We deal first with the "waiver" contention. Before the trial began, Susan Norris urged the district court to rule the limitations issue out of the case because, under the Illinois tolling principles protecting trust beneficiaries, the statute of limitations did not begin to run until the trust terminated or William Wirtz "repudiated" the trust, neither of which events had occurred. (R. Item 98 at 6) In her pretrial ruling (R. Item 102) the district court rejected petitioner's view and held, pursuant to federal law,[1] that the limitations issue should be decided by the jury under a due diligence standard.

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[1] The "applicable Seventh Circuit precedent" applied by the Court consisted of *Tomera* v. *Galt*, 511 F.2d 504 (7th Cir. 1975), and *Goldstandt* v. *Bear, Stearns & Co.*, 522 F.2d 1265 (7th Cir. 1975). (R. Item 102 2-3) *Tomera*—decided before this Court's rulings in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975)—continued to apply the old rule that tolling was to be determined in accordance with *federal* common law. *Tomera*, 511 F.2d at 809. *Goldstandt* simply incorporated the (federal) test from *Tomera*. *Goldstandt*, 822 F.2d at 1268.

(Footnote continued on the following page)

Despite the district court's disagreement with her view, petitioner tendered a jury instruction, again suggesting the applicability of the same Illinois trust beneficiary tolling principle.[2] The district court rejected it. Petitioner also submitted an *alternative* general instruction, applicable to the defendants *other than* the trustee William Wirtz, which, after setting forth the fraudulent concealment and reasonable diligence standards, would have instructed the jury that "a beneficiary of a trust has no affirmative duty to investigate the conduct of the trustee." The district court rejected this instruction as well. The instruction actually given omitted this statement.

On appeal, petitioner again argued that the instruction given was excessively favorable to the Wirtzes but that the evidence sustained the verdict even under the wrong standard. The Wirtzes did not argue in the Court of Appeals that there had been any "waiver" by petitioner in the district court.

Obviously, there *was* no "waiver" here. Under Rule 46 of the Federal Rules of Civil Procedure, no formal exception is necessary so long as the court is put on notice of the

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1 *(Continued)*

The source of law governing tolling changed with *Johnson* and *Tomanio*, a change which was recognized in the Seventh Circuit with *Suslick* v. *Rothschild Securities Corp.*, 741 F.2d 1000, 1005 (7th Cir. 1984). It is true that the district judge in her pretrial ruling mentioned the *Suslick* rule requiring application of state law. (R. Item 102 at 2) But her subsequent reliance on the *Tomera* and *Goldstandt* cases and her rejection of Illinois tolling law relating to trustees show that her reliance was on *federal* law.

[2] Plaintiff's Requested Instruction No. 37, expressly applicable to "William Wirtz in his capacity as trustee," would have instructed that the trustee "may not assert the statute of limitations defense . . . as a matter of law." Moreover, defendants' assertion (Br. in Opp. 10) that the instructions given "closely paralleled" an instruction given by plaintiff is misleading. That requested instruction, No. 36, was only applicable to the defendants whom the jury might have found not to have been fiduciaries at all.

party's position; it is not necessary to antagonize the court with repeated objections to an adverse ruling. *Pierce* v. *Ramsey Winch Co.*, 753 F.2d 416, 424 (8th Cir. 1985); *Transcontinental Leasing, Inc.* v. *Michigan National Bank of Detroit*, 738 F.2d 163, 167 (6th Cir. 1984); *Cohen* v. *Franchard Corp.*, 478 F.2d 115, 123 (2d Cir. 1973), *cert. denied*, 414 U.S. 857. Here, petitioner's proposal had been fully briefed, had been twice rejected by the district judge and, on reassertion in the Seventh Circuit, was rejected there as well. No further "objection" was required.

It is preposterous for respondents to argue that the Court of Appeals applied its own view of Illinois state tolling principles. In fact, the Court of Appeals went to great lengths to reject the application of such principles because they provided no period of "repose." (App. A-5 and A-6) The Court of Appeals specifically disclaimed any intention of applying state tolling law, on which it "expressed no opinion." (App. A-8) However, there was no dispute as to what the Illinois trust tolling principles were, for the Seventh Circuit had itself set them forth in *Jefferson National Bank* v. *Central National Bank in Chicago*, 700 F.2d 1143 (7th Cir. 1983). Respondents do not, of course, contend that *Jefferson National* is an incorrect statement of Illinois law. The Court of Appeals simply refused to apply *Jefferson National* here because this is a Rule 10b-5 case and because the application of the Illinois rule would eliminate the "repose" which purportedly was part of the Congressional "plan" under the Exchange Act of 1934. When the Court of Appeals approved that part of the district court's view which stated the "reasonable diligence" standard, it was obviously employing the federal tolling doctrine, not the state tolling law, which it had expressly rejected in the preceding sentence. (App. A-3) Thus, the Court of Appeals was well aware of the significance of its ruling. Its rejection of state tolling principles in Rule 10b-5 cases is hardly a "local issue" or mere "dictum." It is an attempt by the majority to superimpose a period of "repose" upon the tolling rules for Rule 10b-5 cases.

Respondents also misstate the tolling issue in arguing that petitioner cited no Illinois decision applying the Illinois trust tolling principles in a case under the Illinois Securities Law. This Court's decisions require use of state tolling principles which emanate from the status of the plaintiff such as infancy, imprisonment, incompetency and fiduciary relationship. *Robertson* v. *Wegmann*, 436 U.S. 584 (1978); *Johnson*, *supra*, 421 U.S. at 464; *Barney* v. *Oelricks*, 138 U.S. 529 (1891). The Illinois trust tolling principle is just such a rule. There is no reason to conclude, and certainly no Illinois case holding, that Illinois courts would not apply it in an action under the Illinois Blue Sky Law. Therefore, under *Tomanio*, *supra*, and *Johnson*, *supra*, the federal courts must apply it in a Rule 10b-5 case.

II. THE FEDERAL EQUITABLE TOLLING DOCTRINE IN 10b-5 CASES IS NOT BLIND TO THE INDIVIDUAL CIRCUMSTANCES OF INVESTORS.

Respondents seriously distort the petitioner's position, and the body of precedent in the circuits, concerning the split over the "objective" and "subjective" versions of the federal tolling doctrine. The split does not consist of differences over the verbal formulation of the "reasonable care" standard but as to whether that standard takes into account the age, sophistication and beneficiary status of the buyer or seller of securities who has been defrauded in violation of Rule 10b-5.

Despite respondent's efforts to brush it aside, it is certain that such a split does exist and that it has compounded the uncertainty and confusion in Rule 10b-5 tolling law. The *Report of the Task Force on Statute of Limitations for Implied Actions* of the ABA's Committee on Federal Regulation of Securities, citing the cases discussed in the Petition, states:

> The equitable tolling doctrine itself is applied differently by the various circuit courts of appeals. Some courts consider that the extent of a plaintiff's obligation to discover the facts of the

> fraud against him should be determined subjectively, taking into account such factors as an individual's unusual sophistication. Other courts apply an objective standard, requiring the plaintiff to exercise that degree of diligence which a reasonable person could or would use. Because disparate standards may be applied by different courts and to different plaintiffs, it is impossible to predict when a cause of action arising out of a particular transaction will be finally barred. 41 Bus. Law. 645, 654-55 (1986).

In *Sperry* v. *Barggren*, 823 F.2d 708 (7th Cir. 1978), the Seventh Circuit included within the "reasonable care" standard the specific circumstances in which the plaintiff finds himself or herself, including a fiduciary relationship. Here the Seventh Circuit cast this approach aside and mentioned the plaintiff's specific circumstances, including her age and beneficiary status, only to reject their significance. Any fair reading of the Seventh Circuit's opinion shows that Susan Norris was held to a so-called "objective" standard under which she was charged with the duty to tell her lawyer Cuccio, years later, things that an 18-year-old could neither have known nor understood in 1967-1968. Thus, the Seventh Circuit holds:

> Although Susan, only 18 at the time, did not appreciate what was going on and why an appraisal was called for, she was legally an adult and of sound mind. The statute began to run when a reasonable person would have appreciated the need for further inquiry. *An objectively reasonable person* would have appreciated the need for further inquiry in 1967. (App. A-10).

It is this use of a purportedly "objective" tolling test which the Court of Appeals uses to set aside the jury verdict by concluding that Susan Norris, who had access to exactly the same information as the probate judge, and no more, should have suspected fraud when he did not.

In resolving the uncertainty in the current law of Rule 10b-5 tolling, as reflected in the Seventh Circuit's "plea for help" in this case, this Court should hold once and for all

that the federal tolling doctrine, if applicable at all, must consider the real world circumstances in which the plaintiff is placed. Here, the test is whether a reasonable 18-year-old trust beneficiary with a high school education was put on notice of facts suggesting that her trustee, her father's best friend, might have defrauded her. No rational jury could have so concluded.

III. PETITIONER DID NOT "WAIVE" HER RIGHT TO EQUAL PROTECTION.

Respondents argue that Susan Norris "waived" her right to be treated the same as a male for purposes of determining whether she was "legally an adult" under Illinois law. Thus, respondents seek to excuse the Court of Appeals' failure to honor the mandate of *Stanton* v. *Stanton*, 421 US. 7 (1975), and the clear directive of the Illinois court in *Jeschke* v. *Ruhlow*, 59 Ill.App.3d 125, 376 N.E.2d 15 (1978), that females are not to be treated as adults at age eighteen for limitations purposes when males would not be.

Respondents do not argue that the Illinois Probate Act provision creating different majority ages for males and females was constitutionally valid. Under *Stanton*, it obviously was not.

Susan Norris would not be held to have "waived" her equal protection right unless that waiver was, "at the very least, clear," *Fuentes* v. *Shevin*, 407 U.S. 67, 95 (1972).[3] Here, petitioner took no act of any kind to even hint at waiver. Her "failure to object" to one-sentence statements in the closing argument of respondents' counsel and in the respondents' brief on appeal hardly amounts to a "clear waiver," nor do they show that plaintiff even

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[3] This Court has held that "clearly" is the *minimum* standard for waiver, but has left open whether the test should be the stronger one of "voluntarily, intelligently and knowingly made,"*Fuentes*, *id.* at 94; *see also K.M.C. Co., Inc.* v. *Irving Trust Co.*, 757 F.2d 752, 755-57 (6th Cir. 1985). Of course, there is nothing in the present case which comes even close to meeting either standard.

understood that a right of any kind was purportedly being waived. Nor was she required to submit a jury instruction to preserve her constitutional right. Of course, she *prevailed* before the jury on the instruction actually given.

The constitutional violation of making Susan Norris' "childhood" dispositive of the limitations issue did not emerge in this case until the majority issued its opinion. Significantly, respondents cite not a single authority for their argument that Susan Norris "waived" her constitutional right to equal treatment under *Stanton* and *Jeschke*.

Respondents also say (Br. in Opp. 20) that "petitioner does not argue that the knowledge that she had as a 'minor' is to be ignored in determining whether the statute of limitations started to run after she reached the age of majority." Petitioner *has* so argued, both here and in her petition for rehearing in the Court of Appeals. It was clearly inappropriate for the Court of Appeals to apply an "objective" standard of due diligence based upon the assumption that a *child* acquired "knowledge" concerning book values, independent appraisals and conflicts of interest on the part of her trustee. It is equally inappropriate to assume such knowledge for the subsequent period 1975-1977, when Susan Norris was an adult, for the majority as to that period imposes upon her the obligation to remember, and impart to her lawyer Cuccio, facts she supposedly learned *as a child*.

Respondents also say that Illinois law "holds" that "knowledge acquired by a child is not to be ignored in determining when the statute begins to run, citing *Ikenn* v. *Northwestern Memorial Hospital*, 73 Ill.App.3d 694, 392 N.E.2d 440 (1979). The *Ikenn* case does not state such a rule but holds simply that a child born blind should have realized some time before his twenty-first birthday that his blindness was wrongfully caused. *Ikenn* was a personal injury suit, not a case in which the plaintiff was fraudulently induced, while still a child, to enter into a complicated securities transaction. Under Illinois law, the contracts of a child are voidable after he or she reaches major-

ity and any subsequent ratification must be based on full knowledge of the facts, especially where there is a trustee-beneficiary relationship. See, *e.g.*, *Swiney* v. *Womack*, 343 Ill. 278, 175 N.E. 419 (1931).

Thus, while it is true that the Court of Appeals rested its limitations holding on two different periods, 1967-1968 and 1975-1977, *both* holdings are infected by the majority's failure to follow *Stanton*.[4]

IV. RESPONDENT'S BRIEF CONTAINS NUMEROUS FACTUAL INACCURACIES.

Respondent's "Statement of the Case" contains numerous factual inaccuracies and distortions which require correction here. They include the following:

1. "Attached to the petition [presented by the Wirtzes to the probate court] were certified financial statements. (PX 302, 403A). The financial statements reflected that the proposed redemption prices were equal or nearly equal to the book value of the corporations' assets." (Br. in Opp. 3) In fact, the financial statements did not even mention the prices, let alone describe how the prices were arrived at. (PX 302, 403A) In order to know how the prices were arrived at, Susan Norris at age 18 would have had to subtract the liabilities from the assets and divide by the number of shares in order to arrive at the "book value" per share and then compare that number with the price. The assets were carried at cost on the financial statements, and neither the petition, nor the financial statements, nor any other document shown to Susan Norris or to the probate judge, disclosed that those cost figures were substantially less than the fair market value of the corporate assets. Professional real estate and stock appraisals were necessary to

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[4] Respondents also contend that "Illinois would have equalized the age of majority at 18, not 21." This speculative assertion is unsupported by any authority. Certainly *Munck* v. *Munck*, 62 Ill.App.3d 223, 378 N.E.2d 1252 (1978), does not support it, for that case was limited to child support and leaves *Jeschke* intact for limitations purposes.

demonstrate the discrepancy.

2. "Cuccio's January 20, 1976, letter also noted that he had reviewed James Norris' will. The will, as previously discussed, referred to the Wirtz-Norris companies and expressly contemplated both the sale of the estate's stock in those entities and purchase of the stock by the Wirtzes through their right of first refusal. . . ." (Br. in Opp. at 5) In fact, the will did *not* mention the three companies whose stock was sold in 1967 and 1968. (PX 1)

3. "Cuccio further testified that he was never refused any information by William Wirtz or Kenneth Scranton, the estate's attorney." (Br. in Opp. at 5) In fact, Cuccio testified that, while he was not "refused" any information, Scranton failed to provide him with certain information which he requested, including the Fourth and Final Account. (Tr. 592, 1403)

4. "In addition, available to him as part of the public record of the probate court proceedings were the petitions seeking approval for the three sales of stock, the financial statements attached to the petitions, and the probate court orders approving the sales. . . ." (Br. in Opp. 5-6) In fact, no financial statements for Judge & Dolph were submitted to the probate judge, and the statements of the St. Louis Arena Corporation were missing from the court file. (PX 101, 401, Tr. 556) The Arena Bowl financials did not disclose that Wirtz Corporation, upon redemption, would be the sole remaining shareholder. (PX 302) As Judge Cudahy noted in dissent, "[T]here was nothing in the probate court records from which Cuccio could have suspected fraud in the 1967 and 1968 sales." App. A-15.

5. "Also available as part of the public record was the First Interim Account filed by Mary Norris and William Wirtz as co-executors, which disclosed the three sales and the sale prices." (Br. in Opp. at 6) In fact, the First Interim Account did not disclose who the purchasers were, namely, that the Wirtzes had bought the shares from themselves through the device of a redemption. (PX 5)

6. "The undisputed evidence was that all of the documents used by other lawyers to file suit in December 1980

were clearly available to attorney Cuccio. . . ." (Br. in Opp. at 21) In fact, there was *no* evidence to support this statement.

7. "The complaint in effect asserted that the unfairness of the prices was disclosed on the face of the probate court petitions, the balance sheets supporting the petitions and the will; i.e., that the sales were self-dealing transactions made at the book value of the shares, a value which bears no relationship to 'fair market price.' " (Br. in Opp. at 7) This is the most egregious misstatement of all. In fact, the complaint made no such allegation. The complaint alleged that the "unfairness" of the prices was *not* disclosed in those materials but was wrongfully concealed from both petitioner and the probate judge. The unfairness was not, and could not be, known until it was discovered that there was "no relationship" between the cost values on the balance sheets and fair market value of the assets. (R. Item 1)[5]

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

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[5] Respondents additionally argue that the Seventh Circuit's "independent review" was an application of the judgment n.o.v. standard. (Br. in Opp. 23-24) However, this contention simply does not comport with the evidence, summarized by Judge Cudahy. The majority "reweighed" the evidence, and that is not "faithful to the judgment n.o.v. standard or the Seventh Amendment."